

MEMORANDUM OF LAW

DATE: August 27, 1990

TO: Will Sniffin, Deputy Director, Water Utilities
FROM: City Attorney
SUBJECT: Applicability of Fish and Game Code Sections
1601 and 1603 to Lake Murray Hydrilla
Eradication Project

You have specifically requested that this office prepare a written memorandum pertaining to the jurisdiction of the State of California Department of Fish and Game (Department) over the hydrilla eradication project at Lake Murray. As I understand the facts from Mr. Maitske, a Fish and Game Warden advised a City work crew on Friday, August 17, 1990, that they were performing activities which required a "permit" under section 1601 of the California Fish and Game Code (all statutory references hereinafter shall be to the California Fish and Game Code). Mr. Maitske explained that City workers, with the assistance of a backhoe and backhoe operator were in the process of up-rooting and removing toolies from the banks of the lake to facilitate eradication of the hydrilla. It was further explained to me that eradication of hydrilla is an on-going process which could best be classified as "routine maintenance."

Our initial advice to Mr. Maitske was to cease the activity and attempt to determine whether The City of San Diego had previously complied with the notification requirements of section 1601. On Monday, August 20, 1990, we were informed that no evidence of such compliance could be located. We then advised Mr. Maitske to cease this activity pending a review by this office, of the legal issues presented.

At the outset, it should be noted that violating the provisions of sections 1601 and 1603 are criminal offenses. Although the City may not be held criminally liable for violating these provisions, its employees are not shielded from this criminal liability. See 67 Op. Att'y Gen. 355 (1984). Therefore, our immediate concern is preventing any City employees or contractors from suffering criminal prosecution and possible

conviction, while this office debates the statutory construction of sections 1601 and 1603 with the Department.

Your inquiry has raised two issues, one legal and the other factual. The legal issue is whether or not the scope of the Department's enforcement authority under sections 1601 and 1603

extends to Lake Murray. The factual issue is whether or not the removal of toolies and hydrilla constitutes a "substantial change" in the bed or bank, or is the eradication process merely "routine maintenance," which in either event would trigger the notification requirements of sections 1601 and 1603.

Section 1601 requires that the Department be notified prior to the commencement of any project by or on behalf of a governmental agency, where the project will "divert, obstruct, or change the natural flow or bed, channel or bank of any river, stream, or lake designated by the department." Section 1603 requires that the Department be notified prior to the commencement of any project by or on behalf of an individual, where the project will "substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream or lake designated by the department."

Both sections have a substantially identical provision whereby if a project involves routine maintenance:

¶ Notice to and agreement with the department shall not be required subsequent to the initial notification and agreement unless the work as described in the agreement is substantially changed, or conditions affecting fish and wildlife resources substantially change, and such resources are adversely affected by the activity conducted under the agreement.

In responding to the legal issue, the language of section 1600 cannot be ignored. It states:

The protection and conservation of the fish and wildlife resources of this state are hereby declared to be of the utmost public interest. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state as well as providing a significant part of the people's food supply and therefore their conservation is a proper responsibility of the state. This chapter is enacted to provide such conservation for these resources.

This language strongly suggests that the state legislature deemed the protection of fish and wildlife resources a matter of statewide concern.

Neither section 1601 (applicable to all governmental agencies, state or local), nor 1603 (applicable to individuals) articulates specific waterways within the scope of the Department's enforcement authority. Instead, the statutes give

the Department the discretionary power to designate those waterways which it deems befitting the protection afforded by these statutes. While this lack of specificity may appear to raise issues of due process, the statutes have withstood constitutional challenge. See *Rutherford v. State of California*, 188 Cal. App. 3d 1267 (1987) and *Willadsen v. Justice Court*, 139 Cal. App. 3d 171 (1983).

Pursuant to the authority conferred by the statutes, the Department enacted an administrative provision which states, "For the purpose of implementing Sections 1601 and 1603 . . . all rivers, streams, lakes, and streambeds in the State of California, . . . are hereby designated for such purpose." California Code of Regulations, Title 14, section 720. Although Lake Murray is primarily a reservoir for the storage of water piped from the California aqueduct, it does contain fish, and fishing and boating are permitted. Lake Murray is arguably a waterway subject to the public trust doctrine (see *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983), and one which contains resources sought to be protected by sections 1601 and 1603.

Having responded to the legal issue, the factual issue becomes academic. As long as Lake Murray falls within the purview of the statutes, criminal arrests may be made by Department agents whenever they have probable cause to believe violations of the provisions are occurring in their presence. If a City work crew is contacted by a Department agent while removing toolies and cannot provide satisfactory evidence that proper notification to the Department had been made, probable cause for arrest would exist. Whether or not the eradication process constitutes a "change" in the bed or banks of the lake would be resolved in the criminal prosecution and go only to the issue of guilt or innocence, not to the issue of whether the Department has section 1601 and 1603 enforcement jurisdiction over Lake Murray.

It is our conclusion, that absent an opinion from the California Attorney General's office that hydrilla eradication

projects on City owned reservoirs fall outside the scope of sections 1601 and 1603, the most prudent course of action for the protection of City employees would be to comply with the initial notice and agreement provisions available for routine maintenance.

JOHN W. WITT, City Attorney

By

Richard L. Pinckard

Deputy City Attorney

RLP:jrl:711.1
ML-90-88